

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Appellee,)	2 CA-CR 2008-0386
)	DEPARTMENT B
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
ROBERTO AMAYA RODRIGUEZ,)	Rule 111, Rules of
)	the Supreme Court
Appellant.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-50395

Honorable Richard S. Fields, Judge

AFFIRMED IN PART;
VACATED IN PART AND REMANDED

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V Á S Q U E Z, Judge.

¶1 After a jury trial, appellant Roberto Rodriguez was convicted of conspiracy to unlawfully transport or transfer more than eight pounds of marijuana for sale, a class two felony. He argues the trial court imposed an illegal sentence when it applied the sentencing range for the underlying substantive offense pursuant to A.R.S. § 13-3405(C) even though he was convicted of a preparatory conspiracy offense that had a lower sentencing range when Rodriguez committed it. Because we agree the court erred, we vacate Rodriguez's illegal sentence and remand for resentencing.

Facts and Procedural Background

¶2 We view the facts and all reasonable inferences therefrom in the light most favorable to upholding the jury's verdict.¹ *See State v. Tucker*, 205 Ariz. 157, n.1, 68 P.3d 110, 113 n.1 (2003). In May 1994, United States Customs agents and a Pima County sheriff's deputy were investigating suspected illegal drug activity at an apartment complex in Tucson. On May 16, the investigation culminated in the arrest of Rodriguez, along with several others, for their involvement in transporting 108 pounds of marijuana in a pickup truck. Rodriguez was charged with and found guilty of one count of conspiracy to unlawfully transport or transfer marijuana for sale, in an amount over eight pounds. He failed to appear in court on the day the jury returned its verdict, and the court issued a warrant for his arrest. He eventually was located in 2008, and the court sentenced him to a presumptive prison term of seven years pursuant to § 13-3405(C). This appeal followed.

¹Because this case presents a purely legal question, we include only those facts necessary for an understanding of that issue.

Discussion

¶3 Rodriguez argues he was sentenced incorrectly and “must therefore be resentenced.” Because he did not object to the sentence below, we review only for fundamental error. *See State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005). Fundamental error is “error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial.” *Id.*, quoting *State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984). “An illegal sentence constitutes fundamental error that will be reversed on appeal despite a lack of objection in the trial court.” *State v. Cox*, 201 Ariz. 464, ¶ 13, 37 P.3d 437, 441 (App. 2002) (citation omitted); *see also State v. Lewandowski*, 220 Ariz. 531, ¶ 4, 207 P.3d 784, 786 (App. 2009).

¶4 In this case, as noted, the trial court imposed a presumptive, seven-year sentence pursuant to § 13-3405(C), to be served day-for-day. But “an offender [must] be sentenced under the laws in effect at the time he committed the offense for which he is being sentenced.” *State v. Newton*, 200 Ariz. 1, ¶ 3, 21 P.3d 387, 388 (2001); *see* A.R.S. § 1-246. The sentencing range under former A.R.S. § 13-701(C)(1) for Rodriguez’s class-two felony conviction of conspiracy, committed in 1994, provided for a mitigated four-year prison term, a presumptive five-year term, and an aggravated ten-year term. 1993 Ariz. Sess. Laws, ch. 255, §§ 10, 11, 98(A). Although the sentence “did not exceed the maximum permitted by law for [Rodriguez’s] offense[], . . . the sentencing process was fundamentally flawed because the trial court used [a] sentencing range[] other than th[at] mandated for the

offense[] in question.” *Cox*, 201 Ariz. 464, ¶ 13, 37 P.3d at 441. When a court fails to impose a sentence in conformity with our sentencing statutes, the resulting sentence is illegal. *See id.* We therefore agree with Rodriguez that he must be resentenced.

¶5 Rodriguez also argues he “was not excluded from probation . . . by any statute” and asserts he is “entitled to a resentencing for his conviction in which the trial court considers whether probation is appropriate.” As the state concedes, § 13-3405(C) “does not control sentencing for the separate and distinct preparatory offense of conspiracy under A.R.S. § 13-1003.” At the time of Rodriguez’s offense, § 13-3405(C) provided that “a person who is sentenced pursuant to the provisions of subsection B, paragraph 5, 6, 8, 9 or 11 of this section is not eligible for suspension of sentence, probation, pardon or release from confinement on any basis until the person has served the sentence imposed by the court.” 1993 Ariz. Sess. Laws, ch. 255, § 39. The provisions of paragraphs 5, 6, 8, 9, and 11 of subsection B related to producing marijuana and possessing or transporting marijuana for sale. *Id.*

¶6 Because Rodriguez was convicted of conspiracy to transport marijuana for sale under § 13-1003, he was not “sentenced pursuant to” § 13-3405(B)(5), (6), (8), (9), or (11). “It is well settled that . . . the commission of a substantive offense and a conspiracy to commit it are separate and distinct offenses to each of which the legislature may affix a different penalty.” *State v. Gracia*, 121 Ariz. 417, 420, 590 P.2d 1363, 1366 (1979). The legislature did not apply § 13-3405(C) to conspiracy offenses, and the trial court therefore erred in applying it to Rodriguez.

¶7 Last, Rodriguez contends the trial court erred in ordering him to serve his term of imprisonment day-for-day. The court again appears to have believed a day-for-day sentence was required pursuant to § 13-3405(C). But, as discussed above, even assuming that statute mandated such a sentence for the underlying substantive offense, it did not apply to the preparatory offense of which Rodriguez was convicted at the time he committed the offense. We therefore agree with Rodriguez that the court erred in imposing a day-for-day sentence.

Disposition

¶8 We affirm Rodriguez’s conviction but vacate his sentence and remand the matter to the trial court for resentencing in accordance with this decision.

GARYE L. VÁSQUEZ, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

J. WILLIAM BRAMMER, JR., Judge